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IN THE SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1984

UNITED STATES OF AMERICA,

Petitioner,

v.

HUGHES ANDERSON BAGLEY,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the
Ninth Circuit

BRIEF OF THE STATE OF CALIFORNIA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

JOHN K. VAN DE KAMP,
Attorney General
KARL S. MAYER
Deputy Attorney General
THOMAS A. BRADY
Deputy Attorney General
CHARLES R. B. KIRK
Deputy Attorney General
6000 State Building
San Francisco, CA 94102
Telephone: (415) 557-3944
Attorneys for State of California

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INTEREST OF STATE OF CALIFORNIA

In United States courts, criminal convictions for any recent year may

number approximately 36,000.[1/] Criminal convictions in the State of California for a similar period may exceed 230,000.[2/] The opinion below is purportedly based upon federal due process standards established by this Court in Brady v. Maryland (1963) 373 U.S. 83. (See Bagley v. Lumpkin (9th Cir. 1983) 719 F.2d 1462, 1463-1464.) As such, the principle established by the decision herein will of necessity apply to the States and heavily impact upon the judicial system of California.

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1. Statistics furnished by the Administrative Office of the Courts for the year ending June 30, 1984, indicate 36,104 convictions in federal felony and misdemeanor offenses, excluding petty offenses.

2. Statistics furnished by the Administrative Office of the Court of the Judicial Council of California for the year ending June 20, 1983, indicate 233,430 convictions in California felony and misdemeanor offenses, excluding petty offenses.

SUMMARY OF ARGUMENT

The opinion below creates a reversal per se rule in the case of any evidence which was not revealed to the defense in a criminal case pursuant to pre-trial "Brady motion" where that evidence might have been used to cross-examine prosecution witnesses. By ignoring the probable impact of the undisclosed evidence upon the outcome of the criminal proceeding, the opinion below disregards both past and recent decisions of this Court which clearly apply a harmless-error standard in such cases. Furthermore, it creates an unjustified windfall for criminal defendants who belatedly chance upon some undisclosed morsel, with a severe impact upon the judicial system and the concept of finality. Due process does not require absolute perfection in order to achieve a fair trial.

ARGUMENT

THE BELATED DISCOVERY OF UNDISCLOSED EVIDENCE DOES NOT REQUIRE RETRIAL OF A CASE WHERE THE EVIDENCE IS NOT EXCULPATORY AND NONDISCLOSURE IS CLEARLY NOT PREJUDICIAL.

In this case, the defendant made a pre-trial "Brady motion" seeking information including whether or not the Government had paid or promised compensation to witnesses or informants. (719 F.2d, at 1463.) In response, the affidavits of two principal witnesses--both of whom were state law enforcement officers assigned to work with a railroad--were filed in which the witnesses stated that neither received not expected compensation. (Id.) Some three years after conviction, utilizing the Freedom of Information Act (5 U.S.C. §§ 552, 552a), the defendant discovered that the Government had routinely agreed to reimburse both witnesses for expenses. (Id.) The trial court denied the defendant's motion for a new trial in a

post-trial proceeding (28 U.S.C. § 2255), "having concluded beyond a reasonable doubt that disclosure of the ATF agreements would not have affected Bagley's conviction." (Id., at 1464.) In reversing, the Ninth Circuit concluded that failure to disclose this information "inhibited Bagley's ability effectively to cross-examine two important prosecution witnesses" because they were "subject to impeachment for bias based upon their remunerative relationship with the government." (Id.) In essence, the opinion below holds that nondisclosure of any evidence "the defendant could use to conduct an effective cross-examination" requires reversal. (Id.) Yet such a standard is neither espoused by this Court, nor required to insure that a defendant will receive a fair trial.

The standard adopted by the Ninth Circuit--any diminution of the defendant's ability to cross-examine a witness denies due process of law--is tantamount to a "per se" reversal rule. (Cf. United States v. Valenzuela-Bernal (1982) 458 U.S. 858, 866.) Yet this Court long ago dispatched the notion that every nondisclosure of evidence deprives a defendant of a fair trial. In Giglio v. United States (1972) 405 U.S. 150, 154, this Court stated:

> "We do not, however, automatically require a new trial whenever 'a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict . . . .' [Citation.]

> A finding of materiality of the evidence is required under Brady . . . ."

Later, in United States v. Agurs (1976) 427 U.S. 97, 108-110, which involved nondisclosure of the witness' criminal record, this Court commented:

> "The Court of Appeal appears to have assumed that the prosecutor has a constitutional obligation to disclose any information that might affect the jury's verdict. That statement of a constitutional standard of materiality approaches the 'sporting theory of justice' which the Court expressly rejected in Brady. For a jury's appraisal of a case 'might' be affected by an

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improper or trivial consideration as well as by evidence giving rise to a legitimate doubt on the issue of guilt. If everything that might influence a jury might be disclosed, the only way a prosecutor could discharge his constitutional duty would be to allow complete discovery of this files as a matter of routine practice.

". . . The mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense." (Footnotes omitted.)

This Court then declared (at 111-113):

"[T]he judge should not order a new trial every time he is unable to characterize nondisclosure as harmless under the customary harmless-error standard. Under that standard when error is present in the record, the reviewing judge must set aside the verdict and judgment unless his 'conviction is sure that the error did not influence the jury, or had but a very slight effect.' [Citation.] Unless every nondisclosure is regarded as automatic error, the constitutional standard of materiality must impose a higher burden on the defendant.

"The proper standard of materiality must reflect our overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has not been committed. This means that the omission must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial."

The expression of the applicable principles in Agurs was recently reaffirmed in United States v. Valenzuela-Bernal (1982) 458 U.S. 858, 868. The requirement of "materiality" before nondisclosure affronts the Constitution was also noted in California v. Trombetta (1984) ___ U.S. ___, 81 L.Ed.2d 413, n. 8 at 422, and has been described by this Court as "the widely used standard for assessing motions for new trial based on newly discovered evidence" in Strickland v. Washington (1984) ___ U.S. ___, 80 L.Ed.2d 674, 697.

Though Strickland did not refer to California practices, it might well have. California has several procedural avenues for attacking a conviction on the basis of newly-discovered evidence. One of this is the statutory motion for a new trial which by definition is available on such a basis only "When new

evidence is discovered material to the defendant, and which he could not, with reasonable diligence, have discovered and produced at the trial." (Cal. Pen. Code, § 1181(8), emphasis added.) "To entitle a party to a new trial on the ground of newly discovered evidence it must appear that the evidence is not merely cumulative, but is material, and that it is such as to render a different result probably on retrial . . . ." (People v. Sheran (1957) 49 Cal.2d 101, 111, 315 P.2d 5, 11; accord, People v. McDaniel (1976) 16 Cal.3d 156, 178, 127 Cal. Rptr. 467, 481, cert. denied, 429 U.S. 847; People v. Mattison (1971) 4 Cal.3d 177, 188, 93 Cal. Rptr. 185, 192.) A similar rule prevails where the new discovery of evidence is the basis for habeas corpus relief similar to the section 2255 relief sought by respondent Bagley here.

"[N]ewly discovered evidence does not warrant relief unless it is of such a character 'as will completely undermine the entire structure of the case upon which the prosecution was based.' [Citation.] [N]ewly discovered evidence will not undermine the case of the prosecution so as to warrant habeas relief unless (1) the new evidence is conclusive, and (2) it points unerringly to innocense." (In re Weber (1974) 11 Cal.3d 703, 724, 114 Cal. Rptr. 427, 433, cert. denied, 429 U.S. 847; accord, In re Hall (1981) 30 Cal.3d 408, 417, 423, 179 Cal. Rptr. 223, 230-231.)

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In evaluating the gravity of the error, California courts consider the context in which the error occurs, and, unlike the Ninth Circuit here, do not exalt technical violations in utter disregard of substance. As our highest court has noted: "In considering the materiality of the evidence, we must look to the entire record because materiality can only be determined in the light of the circumstances." (In re Ferguson (1971) 5 Cal.3d 525, 533, 96 Cal. Rptr. 594, 600.) "[T]he test . . . is an objective one based on all the evidence, old and new, whether any second trier of fact, court or jury, would probably reach a different result." (People v. Huskins (1966) 245 Cal.App.2d 859, 862, 54 Cal. Rptr. 253, 255; accord, People v. Clauson (1969) 275 Cal.App.2d 699, 706, 80 Cal. Rptr. 475, 480.) In this regard, California follows the lead

of this Court in United States v. Agurs (1976) 427 U.S. 97, 112-113:

> The "error" below concerned the nondisclosure of what at best might be termed marginally-impeaching evidence.[3/] In California, "As a general rule, 'evidence which merely impeaches a witness is not significant enough to make a different result probable.'" (People v. Green (1982) 130 Cal.App.3d 1, 11, 181 Cal. Rptr. 507, 514; People v. Huskins, supra, 245 Cal.App.2d at 862, 54 Cal.

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3. The two witnesses apparently signed what was a standard governmental contract, and the trial court found that they "probably 'did expect to received from the United States some kind of compensation, over and above their expenses for their assistance, though perhaps not for their testimony." (719 F.2d, at 1462.)

Rptr., at 255.)[4/] The California rule recognizes the fact--well-known to trial lawyers--that technically-impeaching evidence is seldom viewed as any more than that by either judge or jury. Certainly the "impeaching" value of the evidence which the Government did not disclose here was minimal.

Yet the scope of "error embraced by the Ninth Circuit is boundless. As this Court noted of the witness deported in United States v. Valenzuela-Bernal (1982) 458 U.S. 858, 866-867:

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4. California courts do distinguish those cases where the impeaching value of the evidence is so devastating that it totally destroys the credibility of the sole prosecution witness. (See People v. Williams (1962) 57 Cal.2d 263, 274-275, 18 Cal. Rptr. 729, 736; People v. Randle (1982) 130 Cal.App.3d 286, 293-294, 181 Cal. Rptr. 745, 749-750; People v. Huskins, supra, 245 Cal.App.2d at 863, 54 Cal. Rptr. at 255.)

> "Given the vagaries of a typical jury trial, it would be a bold statement indeed to say that the testimony of any missing witness could not have 'conceivably benefited' the defense. To us, the number of situations which will satisfy this test is limited only by the imaginations of judges or defense counsel." (Footnote omitted.)

Similarly, almost anything--however inconsequential to the ordinary eye--may seem monumental to the fanciful cross-examiner. Hindsight speculation as to the possible utility of evidence cannot be the criterion for evaluating error; even the best counsel may disagree on

that point. (Cf. Strickland v. Washington (1984) ___ U.S. ___, 80 L.Ed.2d 674, 694-695. It has been California's experience that the significance of evidence looms larger in loss than in life. (See, e.g., People v. Harris (1976) 62 Cal.App.3d 859, 863, 133 Cal. Rptr. 352, 354.) Were a per se reversal rule to obtain, the significance of undisclosed evidence would no doubt receive similar post-conviction magnification.

What is worse is what the decision below portends for our judicial system. The larger the judicial system-- and California has perhaps the largest of all--the greater likelihood of error, not because the system is defective, but because it is staffed by human beings, a mortal quality of which is to err. California cases demonstrate the truism expressed in In re Imbler (1963) 60 Cal.2d 554, 567, 35 Cal. Rptr. 293, 300, cert.

denied, 379 U.S. 908, that "Police investigators, however, are not infallible . . . ." Thus we know of cases where an investigating officer erroneously believes that a witness statement was incorporated in his report, when in fact it was not and was therefore not disclosed (People v. Reyes (1974) 12 Cal.3d 486, 501-502, 116 Cal. Rptr. 217, 226), or where negatives are overlooked resulting in photographs which are not printed (People v. Harris (1977) 71 Cal.App.3d 959, 968, 139 Cal. Rptr. 788, 784). The prosecutor himself may overlook a statement in his own file, which consequently goes undisclosed. (People v. McGowan (1980) 105 Cal.App.3d 997, 1001, 166 Cal. Rptr. 725, 727.) These prospects never end. And neither does the hope of subsequently finding a miniscule shred of undisclosed evidence which serves as a guarantor of release

or reversal. Our highest court once stated that "[T]he claim of newly discovered evidence as a ground for a new trial is uniformly 'looked upon with disfavor,' for there must be an end to litigation." (People v. Williams (1962) 57 Cal.2d 263, 274, 18 Cal. Rptr. 729, 736.) The per se reversal rule of the Ninth Circuit, however, changes a criminal trial from a fair search for truth into the qualifying round of a treasure hunt.

Due process guarantees neither a successful outcome nor a letter-perfect defense. (People v. Wallin (1981) 124 Cal.App.3d 479, 484-485, 177 Cal. Rptr. 303, 306.) Or as this Court has observed, "A defendant is entitled to a fair trial but not a perfect one." (Lutwak v. United States (1953) 344 U.S. 604, 619.) The decision below demands otherwise.

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CONCLUSION

For the foregoing reasons, the State of California, as amicus curiae in support of petitioner United States, urges reversal.

DATED: December 28, 1984

JOHN K. VAN DE KAMP,
Attorney General

KARL S. MAYER
Deputy Attorney General

THOMAS A. BRADY
Deputy Attorney General

CHARLES R. B. KIRK
Deputy Attorney General

Attorneys for State of California

CERTIFICATE OF SERVICE BY MAIL

CHARLES R. B. KIRK, a member of the Bar of the United States Supreme Court, hereby certifies that on December 28, 1984, a copy of the Brief of the State of California as Amicus Curiau in support of Petitioner was served by mail upon the counsel of record for each of the parties respondent by depositing a copy in the United States Mail at the United States Post Office in the Federal Building, 455 Golden Gate Avenue, San Francisco, California, with first-class postage pre-paid, and properly addessed as follows:

MICHAEL G. MARTIN
Assistant Federal Public Defender
1111 3rd Avenue, Suite 380
Seattle, WA 98101
Attorneys for Respondents

DAVID A. STRAUSS
Assistant to Solicitor General
Department of Justice
Washington, DC 20503
Attorneys for Petitioner

DATED: December 28, 1984
San Francisco, California

CHARLES R. B. KIRK

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